TAN BOON LIEU & ORS

v.

CHEOW TONG CHAI & ANOR

COURT OF APPEAL, KUALA LUMPUR
PAJAN SINGH GILL FCJ
MOKHTAR SIDIN JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-02-311-2001]
14 NOVEMBER 2003

UNINCORPORATED ASSOCIATIONS: *Unincorporated associations - Meetings - Election of executive committee - Election of appellants' group declared null and void - Appeal - Appeal heard after term of office bearers expired - Whether appeal rendered academic - Whether election to be conducted by independent panel*

CIVIL PROCEDURE: *Appeals - Appeal to Court of Appeal - Unincorporated association - Election of executive committee declared null and void - Appeal - Appeal heard after terms of office bearers had expired - Whether appeal rendered academic - Whether would serve no purpose*

The appellants and the respondents belonged to an association known as the Selangor & Kuala Lumpur Foochow Coffee Bar & Restaurant Merchants' Association ('the association'). Disputes arose between the parties pertaining to the election of the executive committee members of the association, held on 14 May 2000 to replace the 1998-1999 executive committee, when the returning officer, upon the basis that 178 of the 317 balloting papers posted were invalid, declared the group led by the respondents as the winners, whilst the chairman of the election commission, upon the basis that the whole 317 of the balloting papers were valid, declared that the group headed by the appellants were the winners. The parties having been unable to settle their differences, on 11 July 2000 the respondents applied for and obtained a declaration that the election of the appellants and their group was null and void, and also an injunction stopping the latter from functioning as office bearers of the association. The appellants appealed and on 30 October 2002, the Court of Appeal, by a majority decision (the minority abstaining), whilst refusing to deliberate on the merits of the appeal for reason that such an exercise was purely academic, advised the parties to appoint an independent panel to conduct the election of its 2003-2004 executive committee. The squabbles between the parties however continued unabated, whereupon, on 3 March 2003, the appellants filed a notice of motion seeking the court's indulgence to clarify on its advice aforesaid.

Held:
Per Mokhtar Sidin JCA (for the majority)

[1] Rule 16 of the rules of the association provided that the executive committee members shall hold office only for a period of two years. Thus, whichever group that might have won the election would hold office only for a period of two years from 14 May 2000, *ie*, until 13 May 2002. (p 153 g-h)

[2] The appeal came for hearing on 30 October 2002. Bearing in mind that the tenure of office of the executive committee members declared to be the winners of the election held on 14 May 2000 had already expired on 13 May 2002, the appeal before this court is purely academic. The court would for this reason decline to hear the appeal on merits as it would not serve any purpose. (pp 153 i & 154 a-c)

[3] We had advised that the parties appoint an independent panel to conduct the election upon consideration of the continued friction between the two groups and the fact that there was no executive committee members in existence at the time when the appeal was heard. We could however only offer advice as to how the disputes could be resolved. We could not offer more than that and if the parties chose to ignore our advice there is nothing we could do about it. (pp 154 i, 155 i & 156 a)

Per Abdul Aziz Mohamad JCA (abstaining)

[1] Before going up the bench on 30 October 2002, I had only been able to read the High Court judge's grounds of decision and to glance over the written submissions for the appeal. I felt that the oral submissions in open court were not sufficient to enable me to make a decision. I needed to verify the facts by reading the affidavits, of which there were quite a number. So on that date I made no decision. (pp 156 i & 157 a)

[2] If it is correct that the appeal has not been heard on its merits, the question that should be asked is whether the appeal should be dismissed on the ground that it is academic and that a decision on it would not serve any purpose. My decision would be no. The appeal should be heard on its merits because, in the first place, to dismiss the appeal would be tantamount to confirming the respondents in their victory in the High Court and, in the second place, a decision on the merits of the appeal is necessary to aid in settling feelings between the contending parties. Continued uncertainty between the groups as to who is right and who is wrong would perpetuate mistrust and ill-will between them.
(pp 159 h & 160 a-c)

[3] The appellants' case is that it had been the traditional accepted practice and election procedure ('tradition') that ballot papers are issued with 45 boxes because 45 persons are to be elected, namely 43 executive committee members and 2 auxiliary members. Clearly, if there had been such a tradition, it did not contravene clause 9 of the rules. On the contrary it is beneficial for the attainment of cl. 9 as it helps ensure that the committee has 43 members all the time. (p 162 e-h)

[3a] There is no reason why members of an association cannot adopt a tradition that does not contravene the rules of the association or the law but, on the contrary, is contributive to the observance of a particular rule. Hence, if I were to judge the dispute as to the existence of the tradition I would not hesitate to decide that there was such a tradition. (p 163 g)

[4] Since I did not take part in the decision of 30 October 2002, the attitude that I took towards the notice of motion was that I should participate in a decision on it only insofar as it was a decision on some aspect that did not involve reasons for ordering a fresh election. However, I subsequently realized from the pronouncements by Mokhtar Sidin JCA that the sitting was for the purpose of his explaining what he had said on 30 October 2002 about the election and its supervision in response to a letter from the appellants' solicitors. The notice of motion was then ordered to be fixed for hearing on another date. (p 164 f-h)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu dan responden adalah ahli-ahli Persatuan Saudagar-Saudagar Restoran Kopi & Bar Foochow Selangor dan Kuala Lumpur ('persatuan'). Pertelingkahan berbangkit di antara pihak-pihak bersabit pemilihan jawatankuasa eksekutif persatuan, yang diadakan pada 14 Mei 2000 bagi mengganti jawatankuasa eksekutif 1998-1999, apabila pegawai pemilihan, atas dasar bahawa 178 dari 317 kertas undi yang diisi adalah tak sah, mengisytiharkan kumpulan yang diketuai oleh responden sebagai pemenang, sementara pengerusi suruhanjaya pemilihan pula, atas pendapat bahawa keseluruhan 317 kertas undi tersebut sah, mengisytiharkan kumpulan yang diketuai oleh perayu sebagai pemenang. Dengan pihak-pihak gagal menyelesaikan pertelingkahan mereka, pada 11 Julai 2000 responden telah memohon dan memperolehi perintah bahawa pemilihan perayu dan kumpulannya adalah tak sah, serta injunksi menghalang perayu dan kumpulannya dari menjalankan tugas sebagai pegawai persatuan. Perayu merayu dan pada 30 Oktober 2002, Mahkamah Rayuan, melalui satu keputusan majoriti

(minoriti berkecuali), menolak dari mendengar rayuan berdasarkan merit atas alasan bahawa halperkara yang wujud sudah menjadi akademik, sekaligus menasihati pihak-pihak supaya melantik satu panel bebas bagi mengendalikan pemilihan jawatankuasa eksekutif persatuan bagi sesi 2003-2004. Permusuhan antara pihak-pihak namun begitu masih berterusan, dan dengan itu, pada 3 Mac 2003, perayu memfailkan notis usul memohon supaya mahkamah memperjelaskan dengan lebih terperinci akan nasihatnya di atas.

Diputuskan

Oleh Mokhtar Sidin HMA (bagi pihak majoriti)

[1] Peraturan 16 peraturan-peraturan persatuan memperuntukkan bahawa ahli-ahli jawatankuasa eksekutif hendaklah memegang jawatan hanya untuk tempoh dua tahun. Oleh itu, mana-mana pihak pun yang menang akan hanya memegang jawatan untuk tempoh dua tahun dari 14 Mei 2000, iaitu sehingga 13 Mei 2002.

[2] Rayuan di sini telah dikemukakan untuk pendengaran pada 30 Oktober 2002. Memandangkan bahawa tempoh pemegangan jawatan bagi jawatankuasa eksekutif yang memenangi pemilihan pada 14 Mei 2000 telah luput pada 13 Mei 2002, maka rayuan jelas sudah menjadi akademik. Atas alasan ini mahkamah tidak berhasrat untuk mendengar rayuan berdasarkan merit, kerana berbuat demikian tidak mendatangkan apa-apa faedah.

[3] Kami telah menasihati pihak-pihak supaya melantik panel bebas bagi menangani pemilihan dengan mengambilkira pergeseran yang berterusan di antara mereka dan juga kerana tidak ada jawatankuasa eksekutif yang wujud sewaktu rayuan didengar. Kami bagaimanapun hanya boleh memberi nasihat tentang bagaimana pertelingkahan boleh diatasi. Kami tidak boleh menawarkan lebih dari itu dan jika pihak-pihak memilih untuk memandang sepi akan nasihat kami, tiada apa lagi yang boleh kami buat mengenainya.

Oleh Abdul Aziz Mohamad HMR (berkecuali)

[1] Sebelum menaiki persidangan pada 30 Oktober 2002, saya hanya dapat membaca alasan penghakiman oleh Mahkamah Tinggi serta mengimbas hujah-hujah bertulis bagi rayuan ini. Saya merasakan bahawa hujah-hujah lisan yang dikemukakan di mahkamah terbuka adalah tidak memadai untuk membolehkan saya membuat keputusan. Saya perlu mengesahkan fakta-fakta dengan membaca afidavit-afidavit, yang agak banyak. Jadi pada hari tersebut saya tidak membuat sebarang keputusan.

[2] Jika ianya benar bahawa rayuan tidak didengar di atas meritnya, persoalan yang perlu ditanya adalah sama ada rayuan harus ditolak atas alasan bahawa ianya sudah menjadi akademik dan bahawa sebarang keputusan mengenainya tidak akan memberi apa-apa faedah. Jawapan saya adalah tidak. Rayuan sepatutnya didengar atas meritnya kerana, pertamanya, menolak rayuan bererti mengesahkan responden dalam kemenangan mereka di Mahkamah Tinggi, dan keduanya, suatu keputusan di atas merit rayuan adalah perlu bagi membantu mententeramkan perasaan di antara pihak-pihak yang berteligah. Ketidakpastian yang berpanjangan di antara pihak-pihak berkaitan siapa salah dan siapa betul akan hanya mengekalkan perasaan curiga dan tidak puas hati diantara mereka.

[3] Kes perayu adalah bahawa ianya sudah menjadi amalan tradisi prosedur pemilihan yang diterimapakai ('tradisi') bahawa kertas undi mengandungi 45 petak-petak kerana 45 orang akan dipilih terdiri dari 43 ahli jawatankuasa eksekutif dan 2 ahli tambahan. Adalah jelas bahawa sekiranya tradisi sedemikian memang wujud, ia tidak bercanggah dengan fasal 9 peraturan-peraturan persatuan. Sebaliknya ia membantu pencapaian maksud fasal 9 dengan mempastikan bahawa jawatankuasa mempunyai 43 ahli bagi setiap masa.

[3a] Tiada alasan kenapa ahli-ahli sesebuah persatuan tidak boleh menerima satu tradisi yang tidak menyalahi undang-undang atau peraturan-peraturan persatuan itu, tetapi sebaliknya menyumbang kepada pematuhan sesuatu peraturan. Oleh itu, sekiranya saya perlu membuat keputusan dalam soal kewujudan tradisi seperti ini, saya tidak akan teragak-teragak memutuskan bahawa tradisi sedemikian sememangnya wujud.

[4] Oleh kerana saya tidak mengambil bahagian dalam keputusan pada 30 Oktober 2002, sikap saya terhadap notis usul adalah bahawa saya akan hanya mengambil bahagian dalam satu keputusan berhubung aspek-aspek yang tidak melibatkan alasan-alasan kenapa pemilihan baru diperintahkan. Bagaimanapun, saya kemudiannya mendapati dari pengumunan yang dibuat oleh Mokhtar Sidin HMR bahawa persidangan pada hari itu adalah bagi membolehkan beliau menjelaskan apa yang beliau katakan pada 30 Oktober 2002 berkaitan dengan pemilihan serta pengawasannya sebagai jawapan kepada surat yang dihantar oleh peguamcara perayu. Notis usul tersebut kemudian diperintah supaya dibicarakan pada suatu tarikh yang lain.

Rayuan ditolak.]

For the appellants - SS Muker (Edward Kam & KS Lee); M/s KB Chua & Co
For the respondents - ST Lee; M/s ST Lee & Partners

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-24-42-2000]

Reported by WA Sharif

JUDGMENT

Mokhtar Sidin JCA:

This is an appeal by the appellants, the defendants in the court below (hereinafter referred to as the appellants), against the decision of the High Court granting the declaration and the injunctions prayed for by the respondents, the plaintiffs in the court below (hereinafter referred to as the respondents). The appellants and the respondents belong to an association which is known as the Selangor & Kuala Lumpur Foochow Coffee Bar & Restaurant Merchants' Association. The dispute between the parties arose from an election of the executive committee members of the association held on 14 May 2000. It was not disputed that prior to that election the appellants and their group were the executive committee members being elected previously. The election on 14 May 2000 was pursuant to r. 9 of the rules of the association which provides as follows;

> No. 9 The Executive Committee shall be formed by 43 Executive Committee Members, all of whom shall be elected by the Annual General Meeting. The following shall be elected among the Executive Committee Members:
>
> (i) A Chairman;
>
> (ii) Two Vice-Chairman;
>
> (iii) A General Secretary

Under that rule the general meeting would elect the 43 executive committee members amongst the members of the association. When the 43 executive committee members have been duly elected by the general meeting, they would amongst themselves elect the chairman, the two vice chairman, the secretary and the other office bearers numbering 23. The rest of those elected would become the ordinary members of the executive committee.

The general meeting held on 14 May 2000 took place at about 2pm. It was at this general meeting that the election of the new executive committee members for the year 2000-2001 took place which was to replace the 1998-1999 executive committee members headed by the first appellant. Before the election, Mr. Yong Min Tee was appointed the returning officer by the election commission. Apparently, it was his duty to inspect the balloting papers and to declare whether they were valid or void. It was also for him to declare who were the winners.

On that day, 317 balloting papers were cast. The returning officer, after examining the balloting papers, declared that 178 of the balloting papers were invalid. The 178 balloting papers were declared invalid on the ground that two of them were tempered with and 176 had more than 43 names written on them. It is to be noted the members under the rules were to elect only 43 members to be the executive committee members. After rejecting the 178 balloting papers the balance of the balloting papers were counted and the group headed by the respondents were declared the winners. This group then left the meeting to celebrate. After this group left, the appellants' group remained at the meeting and demanded the chairman of the election commission for a recount and for that purpose to include the 176 balloting papers with more than 43 names. The reason being it was the practice at the previous elections that more than 43 names had been written on the balloting papers. Obviously, this tilted the votes in favour of the group headed by the appellants. The chairman of the election commission and the group headed by the appellants approached Dato' Michael Chen, the legal adviser of the association, for his advice. He advised the chairman of the election commission and the appellants that the group headed by the appellants be the winner based on previous practice. He also advised that the result of the election declaring the group headed by the appellants be published in the China Press, a Chinese newspapers, by way of a notice. This was duly done and the notice in the newspapers appeared on 18 May 2000.

The group headed by the respondents, unaware of the reversal of the result, held their first meeting on 16 May 2000 whereby they appointed the various office bearers. On 19 May 2000, they sent the list of the office bearers to the Registrar of Societies. In our view, by then the group headed by the respondents came to know of the reversal of the result of the election. In the meantime, the appellants and their group appointed security guards to guard and prevent the respondents and their group from entering the association's premises and office. When the respondents and their group discovered that the appellants and their group had been declared the winners and that they were prevented from entering the office and the premises of the association, they took out a writ seeking a declaration that the election of the appellants and their group as stated in the notice in the newspapers was null and void.

In addition, they sought injunctions to stop the appellants from functioning as office bearers. At the same time, the appellants and their group also elected their own office bearers whereby the first appellant was made the chairman, the second appellant as one of the vice chairman and the third appellant as the secretary.

On 11 July 2000, the respondents took out the present summons-in-chambers against the appellants seeking amongst others:

(a) a declaration that the executive committee members constituted by the appellants were null and void of the rules of the Selangor & Kuala Lumpur Foochow Coffee Bar & Restaurant Merchants' Association and in law and any decision or resolution passed by that committee is null and void;

(b) an injunction to stop the appellants from carrying out as the executive committee members of the association and to carry out activities as such including the holding of meetings, functions at the Selangor & Kuala Lumpur Foochow Coffee Bar & Restaurant Merchants' Association or anywhere else and collection of funds;

(c) an injunction to stop the appellants from interfering with the running of the said association; and

(d) to let the respondents use the premises belonging to the association and that the executive committee of 1988-1999 to hand over the minutes, account books, cheque books and other documents pertaining to the association.

On 19 March 2001, the learned trial judge allowed the application by the respondents.

Being dissatisfied with that decision, the appellants appealed to this court. In the meantime, on 16 July 2001, the appellants obtained a stay against the order given on 19 March 2001.

The appeal came up for hearing before us only on 30 October 2002. More than two years had passed since the election was held on 14 May 2000 to elect the 2000-2001 executive committee members of the association. Now, r. 16 of the rules of the association provides:

> No. 16. The tenure of office of the Committee Members shall be for a period of two years but all the members except the Treasurer and Auditors, are eligible for re-election.

Under this rule it is provided the executive committee members shall hold only for a period of two years. The issue before us is which of the two groups were duly elected at the election held on 14 May 2000. Whichever group won the election would hold office only for a period of two years from the date of the election, ie, 14 May 2000. As such, they would hold office until 13 May 2002. As we have stated earlier, the appeal came for hearing before us only on 30 October 2002. As such, the tenure of office of the executive committee members declared to be the winners of the election held on 14 May 2000 had already expired on 13 May 2002. As such, the appeal before us is purely

academic. The words "shall be for a period of two years" in our view are mandatory. We could not find any provision in the rules which allow the tenure of office for two years be extended. This is understandable because the whole idea of the association was to foster closer relationship amongst the clan and no one envisages any dispute amongst the members. The learned counsel for both the parties conceded that whatever order made by this court as to which of the two groups were duly elected they could not hold office anymore since the term had expired.

For the above reasons, we declined to hear the appeal on its merits. We are of the opinion that the appeal is purely academic and the decision of this court would not serve any purpose. As such, we dismissed the appeal with each party bearing its own costs and that the deposit be refunded to the appellants.

Before making that decision, we advised all the parties to call for a meeting of the association as soon as possible in accordance with r. 17 so that a fresh election of the executive committee members could be held. Rule 17 provides:

> No. 17. The Annual General Meeting of Members shall be held between the month of January to April. Every member shall be notified by a letter giving the date and agenda of the meeting together with voting paper 10 days in advance. Notice to that effect shall also be published in the newspaper. The quorum shall be 25 persons. If there is no quorum for the Annual General Meeting, the meeting may be postponed to a date (not exceeding 30 days) to be decided by the Executive Committee. If a quorum is not present for the postponed meeting, the member present shall have power to proceed with the business of the day but they shall not have power to alter the rules of the Association or to make decision affecting the whole membership.

We have also intimated to the parties that the meeting should be held within three months which, according to our reckoning, would be held in January 2003 to coincide with the meeting to be held in accordance with rule 17.

The learned counsel then queried the court as to which group should call for the meeting. It was made clear to us by the reactions and the indications of the parties that neither of the two groups would allow the other group to call for the meeting. It was also clear to us that there were discords and the squabbles between the group led by the appellants and the group led by the respondents. There was no more harmony and spirit of friendship between the two groups.

Bearing in mind that there was no executive committee members in existence at the time when this appeal was heard and the friction between the two groups, we advised the parties to appoint an independent panel to conduct the election. When we said independent panel we meant a panel be set up consisting of members of the association which are not aligned to any of the two groups or

the parent body of the association or an official of the Registrar of Societies to supervise the election. According to the parties, the members of the association belong to the Foochow Association of Malaysia and as such the officials of that association could be invited to conduct the election. We are of the view that the election to be held should be transparent so that no injustice being resulted. We were hoping that with that fresh election to be conducted by the independent panel it would end the disputes, discords and disharmony amongst members of the association especially the members aligned to the two groups. Bearing that in mind, we made it clear that the members entitled to vote and be elected must be confined to those listed as members in the register as on 14 May 2000. We took note that no new members could be recruited for the simple reason that there was no executive committee to validate their memberships. We were hoping that with the advice given at the request of both parties the matter would end there. This was not to be.

Subsequent to that, the solicitors for the appellants wrote to us seeking clarifications as to what had transpired during the hearing of the appeal and what had been stated by us in the open court. We called all the parties concerned to appear before us on 4 July 2003. On 4 July 2003, when the parties appeared before us, the appellants complained of what the respondents had done after the last hearing date which were contrary to what had been advised by this court. The first was the holding of the election by the respondents' group on 24 July 2002 without the supervision of an independent panel. Secondly, the respondents recruited new members. Thirdly, an advertisement by 25 members of the association calling for a meeting to hold the election under the supervision of Foochow Association of Malaysia was injuncted by the respondents and their group. Because of this, the solicitors for the appellants wrote to the court seeking clarification before us.

The respondents' counsel admitted the respondents' group held a meeting on 24 November 2002 where the executive committee members for the year 2003-2004 were elected. The meeting was held without the supervision of an independent panel. The learned counsel stated that the meeting was held on 24 November 2002 to beat the three-month period given by the court. When we advised the three-month period it was from 30 October 2002. As such the meeting held on 24 November 2002 was less than a month after the advice was given. The period of three months given was to enable the opposing parties to sit down together and appoint an independent panel acceptable to both parties.

As we have stated earlier, at the hearing on 30.10.2002, our intention was for the opposing parties to get together and find a way to settle the disputes between them. On that basis, we gave the advice as stated above. That was what we had stated on 30.10.2002. It was not for us to decide who is wrong or who is right. We could only offer advice as to how the disputes between the two

opposing parties could be resolved. We could not offer more than that and if the parties chose to ignore our advice there is nothing we could do about it. The court should not be burdened with squabbles between the parties. It is for them to settle those squabbles amongst themselves since they have ignored our views and advice.

The clarification sought by the solicitors for the appellants had been stated above. We have nothing to add to the above.

My learned brother, PS Gill, FCJ, had read this judgment in draft and expressed his concurrence with what had been stated in this judgment.

Abdul Aziz Mohamad JCA:

The Executive Committee of the Selangor & Kuala Lumpur Foochow Coffee Bar & Restauarant Merchants' Association ("the Association") consists of 43 members elected by the Annual General Meeting ("AGM") of the Association. The tenure of office of the members of the Executive Committee is two years. The two-year term of the Executive Committee for 1998-1999 expired in April 2000. The AGM for electing the Executive Committee for 2000-2001 was held on 14 May 2000.

A dispute arose about the outcome of the election on 14 May 2000. The two respondents contended that they and 41 others, a total of 43, were validly elected. I shall refer to these 43 as "the respondents' committee". The three appellants contended that it was they and 40 others who were elected, besides 2 auxiliaries, a total of 45, that is, 43 members plus 2 auxiliaries. I shall refer to these 43 as "the appellants' committee".

On 11 July 2000 the respondents filed in the High Court an originating summons for certain injunctions against the appellants and certain others, for a declaration that the appellants' committee was illegal, and for certain orders against the appellants and their committee. On 19 March 2001 the High Court granted the orders sought by the respondents, except two of the injunctions. The appellants appealed to this court.

From the nature of the dispute, the question that would have to be decided was which committee, the respondents' or the appellants', was the one lawfully elected on 14 May 2000 to be the Executive Committee, but the hearing of the appeal before us on 30 October 2002 ended instead with a decision by majority that the appeal be dismissed, that the term of whichever committee it was that was lawfully elected on 14 May 2000 had expired in May 2002, and that the election for the new Executive Committee be held within three months. The decision went by majority because I was not yet ready to arrive at any decision and needed time for consideration. Before going up the Bench on 30 October 2002, I had only been able to read the High Court judge's grounds

of decision and to glance over the written submissions for the appeal. I felt that the oral submissions in open court, as far as they had been able to go, were not sufficient to enable me to make an instant decision. I needed to verify the facts by reading the affidavits, of which there were quite a number. So on that date I made no decision.

Since notwithstanding my unreadiness to make a decision then, the appeal was decided all the same by majority, in seeing my further function in the matter of the appeal I was guided by the consideration that if there was no appeal from the decision of the majority, a decision on my part would make no difference and therefore I would not need to make one or to study the case to arrive at one, and that only if there was an appeal would I be obliged to arrive at my decision and write out my grounds for it, as a decision on my part in either direction might assist the Federal Court in deciding the appeal. So I laid this case aside, to return to it only if there was a sign of a step being taken to appeal to the Federal Court.

On 8 August 2003 my secretary received an undated letter from the appellants' new solicitors, which letter was also addressed to the secretaries of my two learned brothers, requesting for the grounds of judgment for the decision of 30 October 2002, but without stating the reasons for requiring the grounds.

On 5 September 2003 I received from my learned brother Mokhtar Sidin JCA, who was the judge presiding on 30 October 2002, a draft of his grounds of judgment for comment. A copy was also forwarded to PS Gill JCA (FCJ since) for the same purpose.

I assume that the draft was prepared to fulfil the request of the appellants' new solicitors. Although there has been no indication of any move towards an appeal to the Federal Court, since Mokhtar Sidin JCA has prepared a draft I nevertheless feel called upon to write this on my part. Taking what I am writing as merely to fulfil the request of the appellants' solicitors and not, or not yet, as for the purposes of an appeal to the Federal Court, and since the request is for the grounds for the decision of 30 October 2002, I should strictly have nothing more to do, since, not having made a decision on my part on that date, I can have no grounds to give for the decision that was made on that date. But even though I am writing this not on the basis that it is to serve the needs of an appeal, I might be thought offhanded to leave the matter at that without giving any indication of what my decision on the appeal would now be, and so I feel that I ought to state it. To do so it is necessary to relate briefly and as far only as necessary how the appeal proceeded on 30 October 2002.

The appellants' counsel submitted first. He went into the merits of the appeal. I believe it was with the purpose of showing that the judge should have decided the dispute in favour of the appellants and dismissed the respondents' application. At certain points in the course of the submission, Mokhtar Sidin JCA introduced the suggestion that a fresh election be held under independent supervision and gave utterance to the thought that the High Court's decision was correct. An hour after the appellants' counsel began his submission, the hearing was adjourned to enable him to consult his clients about the suggestion of a fresh election to settle the dispute. Needless to say, I personally would have been too happy if the appeal was settled amicably, but when hearing resumed almost an hour later the appellants' counsel informed the court that there had been no settlement and continued his submission on the merits of the appeal, towards the end of which, contrary to the stand that I believe he had taken when he began his submission, he said that there had been no valid election of either the appellants' committee or the respondents' committee and that the judge ought to have ordered a fresh election. I do not actually know the reason for the change of stand. One reason could be that counsel feared, from indications proceeding from Mokhtar Sidin JCA, that the appeal would be dismissed, with the result that the position of the respondents' committee as the lawful Executive Committee for the years 2000-2001 that the decision of the High Court established would remain undisturbed, and that rather than having to face that result the appellants preferred that no committee of any party be recognized as the lawful Executive Committee.

The respondents' counsel next entered upon his submission on the merits of the appeal but he was not able to proceed any distance because he was obliged to answer questions from Mokhtar Sidin JCA arising from the fact that since May 2000 there had been no Executive Committee, including questions as to what order the court could make for holding an election under independent supervision. The respondents' counsel did, however, manage to emphasize that the issue to be decided in the appeal was which side's committee was the lawful Executive Committee. As regards who should hold a fresh election, he said – that is, I believe, on the basis that the court was minded to order a fresh election – that it should be the lawful Executive Committee, the Registrar of Societies being invited, I assumed to observe or supervise the proceedings. Those statements from the respondents' counsel implied that he would have the court decide the appeal, the merits of which he had not yet been able to submit on, and thereby determine which party's committee was the lawful Executive Committee.

When Mokhtar Sidin JCA gave a final indication that he might dismiss the appeal, the appellants' counsel submitted that perhaps the fairer order would be to declare the whole election invalid. That seemed to confirm what I said

earlier about his seeming change of attitude. He might have been merely choosing the lesser of two evils for the appellants.

When Mokhtar Sidin JCA turned to me for my decision, I indicated to him my unreadiness to arrive at a decision on the instant. He then announced the majority decision that I have stated. The second part of the hearing, that is the part after the recess, occupied the space of about an hour.

When I was asked for my decision, I thought, from the way in which the proceedings had gone, that I needed to decide the merits of the appeal as well as the question of holding a fresh election. As I said earlier, as to the merits I would need to verify the facts from the affidavits before I could arrive at a decision. After reading the written submissions of both sides before going up the bench on 30 October 2002, my impression had been that the appellants' written submission was much weightier than that of the respondents. In other words, my initial inclination had been to allow the appeal and I was looking rather to seeing from oral submission in the appeal whether the respondents' counsel would be able to raise points or arguments that would overcome my initial leanings, but as the appeal proceeded there was very little submission on the merits that the respondents' counsel was, in the circumstances, able to make. It would not be fair to decide against a party who has not had his say. In the circumstances, the next best thing for me to do, I thought, would be to study the written submissions and all the affidavits of both sides closely and arrive at a decision on the basis of the result of the study.

As to the decision of the majority, I thought that the dismissal of the appeal was a dismissal on merits and that the order for a fresh election was an ancillary order to hasten by compulsion the cessation of hostilities by bringing into being a new Executive Committee as soon as possible. But after reading Mokhtar Sidin JCA's grounds of judgment, with which PS Gill FCJ has confirmed his agreement, I note that according to the majority the appeal was dismissed because, the term of office of whichever party's committee was the Executive Committee validly elected on 14 May 2000 having expired in May 2002, the appeal was purely academic and a decision on it would not serve any purpose, and the court therefore declined to hear the appeal on its merits. To the majority, therefore, the appeal was not heard on its merits.

So if I were now required to give my decision on the appeal, my decision would be this. If it is correct that the appeal has not been heard on its merits, the question that I should have to decide is whether the appeal should be dismissed on the ground that it is academic and that a decision on it would not serve any purpose. My decision would be no, the appeal should be heard and decided

on its merits because, in the first place, to dismiss the appeal would be tantamount to confirming the respondents in their victory in the High Court and, in the second place, a decision on the merits of the appeal is necessary to aid in settling feelings between the contending parties and thus in bringing about at least some measure of peace in the Association. A decision on the merits in favour of the respondents would have some influence on the appellants that might dispose them to accept the correctness of the respondents' case. A decision on the merits in favour of the appellants would bring vindication to them and would have influence on the respondents that might dispose them to accept that they were, after all, in the wrong. Continued uncertainty between groups in an organization as to who is right and who is wrong perpetuates mistrust and ill-will between the groups which would be eliminated or considerably reduced if there is authoritative and respectable confirmation as to who is in the right. The appellants' committee particularly, who, coming into power after the election, were deposed, as it were, by the High Court, would want an opportunity to have their position vindicated so that they could rest assured that whatever they might have done in the exercise of their functions since the election was valid. The election of the next Executive Committee will have to be managed by the 2000-2001 Executive Committee but the members of the Association in general may not be happy to have an election managed by an Executive Committee that has not been finally decided to be the lawful Executive Committee.

As to ordering an election, if the appeal was to be decided on its merits, I would not take it upon myself to be concerned for the Association over the fact of the absence currently of an Executive Committee. If that fact is going to pose a problem for the Association, I would leave it to them and to the winning Executive Committee to seek ways to overcome the problem. I would not impose on them an order for an election which has never been sought.

But what if it were to be construed from the manner in which the proceedings went on 30 October 2002 that the appeal was in fact heard on its merits? What would my decision now be? For the reasons that I have given, I would be able to arrive at a decision only after closely studying all the affidavits and the written submissions, something that, because there has been no appeal from the decision of that date, I am disinclined to expend labour and time to do unless and until I find myself under an imperative obligation to do. I have, however, solely to ascertain or identify the scope and character of the dispute for the purpose of writing this judgment of sorts, cursorily read three affidavits: the first respondent's affidavit in support of the respondents' originating summons, the first appellant's affidavit in reply, and the first respondent's affidavit in reply to the latter. I must say that I have been very impressed by the first appellant's affidavit. I have noticed from those three affidavits that to

decide the appeal completely it is likely to be necessary to come to a finding about certain disputed issues of fact and law that bear on the question of the legality of certain things that were done on 14 May 2000. But from those affidavits I have discerned a question of law and construction, lying probably at the core of the dispute, which I think I can decide on its own, that is without having to also decide other questions and disputes.

The election process had started even before 14 May 2000 with the issuing of ballot papers to members of the Association who were entitled to vote. Each ballot paper had 45 blank boxes. A condition in the ballot paper said:

> Please fill in the names of the persons being voted in proper Chinese characters which must exceed half the number (at least 23 names), otherwise it will be void.

Two things are to be noted from that condition. First, for 23 to be the least full number that exceeds half of another number, the other number must be 45, which was the number of the blank boxes. Second, the ballot paper would be void only if 22 or less boxes were filled in with names, but all the boxes could be filled in, up to 45, since there was no prohibition against it. The voters had cast their votes by filling in the boxes, or some of them, and delivered their ballot papers. What was to be done on 14 May 2002 was to count the votes and determine the candidates elected.

I shall explain the system of election, as I have been able to understand it, by taking the case of an imaginary association that has 100 members eligible to vote and needs to elect 10 persons for some purpose. Each ballot paper will have 10 boxes. Every eligible member voted. Each voter would have filled in the boxes, some filling in the minimum of, say, 5 boxes and others filling in more than 5 boxes or all of the ten boxes. On the election day, when the boxes are checked, the persons named in all the filled-in boxes of the 100 ballot papers are found to be 20 in number, each being named a certain number of times in the filled-in boxes of different ballot papers. The number of times he is named is the number of votes he gets, so that the number of votes of each of the 20 persons should total up to the number of the filled-in boxes of the 1000 boxes of the 100 ballot papers. The number of votes of each of the 20 persons is then arranged, physically or notionally, in order of magnitude, the largest number coming first, followed by the next largest and so on. There would be twenty numbers of votes. The ten candidates to whom belongs the first ten number of votes in the arrangement would be the candidates elected.

In the present case 317 members cast their votes, so that there were 317 ballot papers. The respondents' case is that 178 of those ballot papers were invalid,

and that only 139 ballot papers were valid. The votes counted from the 139 ballot papers resulted in the 43 persons of the respondents' committee being elected.

The respondents' reason for treating the 178 ballot papers as invalid was this: 174 nominated 45 persons, that is, had 45 boxes filled in, 2 nominated 44, and 2 had been tampered with, and they therefore violated cl. 9 of chapter 5 of the rules of the Association. This is said in para. 9 of the first respondent's affidavit in support of the respondents' originating summons. Clause 9 says as follows in its first sentence:

> The Executive Committee shall be formed by 43 Executive Committee Members, all of whom shall be elected by the Annual General Meeting.

The respondents' case is that because only 43 members were to be appointed to the Executive Committee, ballot papers naming 44 or 45 members, totalling 176, were invalid. As to the two ballot papers that had allegedly been tampered with, for whose disqualification the respondents also rely on cl. 9, I note that the clause has nothing to provide a basis for disqualifying them.

The appellants' case is that it had been the traditional accepted practice and election procedure ("the tradition") that ballot papers are issued with 45 boxes because 45 persons are to be elected, 43 of whom to be members of the Executive Committee and 2 to be auxiliary members whose function is to act as a reserve to fill in any vacancy in the 43-member Executive Committee. Their case is that the tradition does not contravene cl. 9, and therefore all the 317 ballot papers were valid, and by a counting of the votes in the 317 ballot papers the winning 45 persons were the appellants' men, those 43 with the highest votes being members of the Executive Committee and the remaining 2 being auxiliaries.

In my judgment, if there had been such a tradition, and that is one of the questions in the dispute, it did not contravene cl. 9. Clause 9 merely fixes the number of members of the Executive Committee at 43. The aim of the tradition was also to choose the 43 members, but with 2 more persons to be auxiliaries to fill in vacancies. The choice of 2 auxiliaries is an additional aim, which does not contravene cl. 9, but, on the contrary, is beneficial for the attainment of cl. 9, in that it helps to ensure that the Executive Committee has 43 members all the time. That is a point that I am able to decide without studying all the other affidavits and without having to decide other points of dispute a decision on which either way will ultimately decide the appeal in favour of or against either party.

There is, however, something that I have observed about the allegation as to the tradition that I feel I ought to state. The place where the appellants allege

the tradition is in para. 7(1) of their affidavit in reply and in para. 8(a) of that affidavit. In para. 7(7), after setting out the tradition, the first appellant says this:

> The above procedure has been and still is the traditional accepted practice and election procedure accepted by the members of the Association for all these years.

And in para. 8(a) the first appellant says this:

> The past elections of the executive committee members after the Second World War had adopted the traditional accepted practice and election procedure and such practice has become the policy of the Association.

Those are strong averments of fact.

The respondents in their affidavit in reply to the appellants' affidavit have not specifically replied to the appellants' para. 7(l). In para. 8 of the respondents' affidavit, they reply to para. 7(g) of the appellants' affidavit. In para. 11 of their affidavit they reply to the appellants' para. 8 as a whole. But in their para. 10, they say this, which could be intended as a reply to the appellants' para. 7(l):

> That it is wrong to say that the traditional procedure was accepted by the Association in the previous elections. I truly aver that the election of the Association traditional practice could never be accepted by the Association which is a registered society and all members of the Association must strictly be [sic] abide by the rules of the Association for what they do in relation to the affairs and activities of the Association. Any wilful interpretation of the rules of the Association should be unacceptable and unlawful.

It is a reply to a strong allegation of fact, not with a specific denial or with a counter-allegation of fact, but with a supposition linked to legal considerations. I do not see why members of an association will not or cannot adopt a tradition that does not contravene the rules of the association or the law but, on the contrary, is contributive to the observance of a particular rule. As to the respondents' para. 11, there is in it no reply whatsoever to the strong and specific averment of fact in the appellants' para. 8(a). Were I to judge the dispute as to the existence of the tradition on the basis only of those paragraphs of the appellants and the respondents, I would not hesitate to decide that there was such a tradition.

That is all that I would have to say in a "judgment" prepared to meet the request of the appellants' solicitors for the grounds of judgment for the decision of 30 October 2002. But since in his grounds of judgment Mokhtar Sidin JCA has also dealt with the proceedings on 4 July 2003, I feel that I ought to set out my side of the story concerning those proceedings.

On 28 February 2003, the appellants' new solicitors wrote to each member of the panel to request some clarification of the orders of 30 October 2002. On 3 March 2003 the appellants by their new solicitors filed a notice of motion seeking clarifications as to how the election for the Executive Committee 2002-2004 was to be conducted, who should be the members of the Election Committee and whether it should include independent parties, and as to the list of eligible voters. In their affidavit in support of the application the appellants said that on 24 November 2002 the respondents had by themselves conducted an election of the Executive Committee for 2002-2004 in which 170 new members of the Association had participated as voters; that another group of 137 members had invited the Federation of Foochow Associations of Malaysia to act as the Election Committee for an election at an Extraordinary General Meeting to be held on 9 January 2003; that 25 members had advertised that election for the information of all members; that the respondents had filed an action to, *inter alia*, restrain the election of 9 January 2003, and that the respondents had obtained an interlocutory injunction. The appellants stated their belief that lack of clarity of the order of 30 October 2002 had given rise to the new action and that a clarification of the order should be able to clear away animosities and misgivings between members. The appellants proposed, in the interests of a permanent solution, that an independent panel be formed, consisting of representatives of certain named associations, to conduct the election.

I knew about the notice of motion when I received a copy of it from the registry with a notification that it had been set down for hearing on 4 July 2003. At that time I had not revisited the case to arrive at a decision on my part on the appeal because, as I said, there had been no appeal against the majority decision of 30 October 2002. Since I did not take part in the decision of 30 October 2002 and had not since arrived at a decision on my part, the attitude that I took towards the notice of motion was that I should participate in a decision on it only insofar as it was a decision on some aspect that did not involve reasons for ordering a fresh election. I went up the bench then thinking that we were going to hear the notice of motion. It was only by the end of the proceedings, which lasted about fifteen minutes, that I realized from the pronouncements by Mokhtar Sidin JCA that the sitting was for the purpose of his explaining what he had said on 30 October 2002 about the election and its supervision in response to a letter from the appellants' solicitors. The notice of motion was then ordered to be fixed for hearing on another date.